90-25

No. ____

IN THE

Supreme Court of the United States

October Term 1989

JOHN J. DILLON III, Commissioner of the Department of Insurance of the State of Indiana, and the Department of Insurance of the State of Indiana,

Petitioners,

v.

TED ALLEN COMBS, Individually and as President of Medical Liability Purchasing Group, Inc. of Indiana, and Medical Liability Purchasing Group, Inc. of Indiana,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit, in a question of first impression, improperly decided that the State of Indiana does not have a right of action to enforce §3903(f) of the Risk Retention Act, 15 U.S.C. §3903(f), in a United States District Court, thereby rendering the 1986 amendments to that Act meaningless.

LIST OF PARTIES

The parties to this Petition are Petitioners, John J. Dillon III, Commissioner of Insurance of the State of Indiana, and the Department of Insurance of the State of Indiana; and Respondents, Ted Allen Combs, individually and as President of Medical Liability Purchasing Group, Inc. of Indiana, and Medical Liability Purchasing Group, Inc. of Indiana.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, John J. Dillon III, Commissioner of the Department of Insurance of the State of Indiana and the Department of Insurance of the State of Indiana (hereinafter "State of Indiana"), respectfully pray the Court issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit (hereafter the "Seventh Circuit") entered in Case Number 89-2550 on February 15, 1990, the petition for rehearing and suggestion of rehearing in banc having been denied April 3, 1990. The Seventh Circuit reversed and remanded this cause to the United States District Court

for the Southern District of Indiana, New Albany Division (hereafter the "District Court") with instructions to dismiss this action for lack of jurisdiction, holding the State of Indiana lacked standing. The District Court had enjoined the respondents from soliciting business in every State of the United States and had frozen Medical Licensing Purchasing Group, Inc.'s funds.

OPINIONS BELOW

The decision of the Seventh Circuit denying Petitioners' request for rehearing and suggestion of rehearing *in banc* was issued on April 3, 1990. A copy of that Order has been included in the appendix at page A-1. The decision of the Seventh Circuit reversing and remanding this cause to the District Court was issued on February 15, 1990. A copy of the Seventh Circuit's opinion is included in the appendix at page A-2. The Decision of the District Court was entered on June 22, 1989. Copies of the District Court's Findings of Fact, Conclusions of Law, and Order and the Judgment are included in the appendix at pages A-7 and A-15 respectively.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254 and Rule 13 of this Court. The decision of the Seventh Circuit was entered on February 15, 1990. This decision was reviewed on April 3, 1990, when the Seventh Circuit denied Petitioners' Petition for Rehearing and Suggestion of Rehearing In Banc. This petition is timely filed in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. §2101(c) and Rule 13.4, Rules of the Supreme Court of the United States, as measured from the issuance of the denial of Petitioners' Petition for Rehearing and Suggestion of Rehearing In Banc as provided by Rule 20.4, Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS

15 U.S.C. 1011 provides:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation of such business by the several States.

5 U.S.C. 3903 provides in pertinent part:

> (a) Except as provided in this section, a purchasing group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would —
>
> (1) prohibit the establishment of the purchasing group;
>
> (2) make in unlawful for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its members, advantages, based on their loss and expense experience, not afforded to other persons with respect to rates, policy forms, coverages, or other matters;
>
> (3) prohibit a purchasing group or its members from purchasing insurance on the group basis described in paragraph (2) of this subsection;
>
> (4) prohibit a purchasing group from obtaining insurance on a group basis because the group has not been in existence for a minimum period of time or because any member has not belonged to the group for a minimum period of time;
>
> (5) require that a purchasing group must have a minimum number of members, common ownership or affiliation, or a certain legal form;
>
> (6) require that a certain percentage of a purchasing group must obtain insurance on a group basis;

(7) require that any insurance policy issued to a purchasing group or any members of the group be countersigned by an insurance agent or broker residing in that State; or

(8) otherwise discriminate against a purchasing group or any of its members.

* * *

(c) State may require that a person acting, or offering to act, as an agent or broker for a purchasing group may obtain a license from that State, except that a State may not impose any qualification or requirement which discriminates against a nonresident agent or broker.

(d) (1) A purchasing group which intends to do business in any State shall furnish notice of such intention to the insurance commissioner of such State. Such notice —

(A) shall identify the State in which such group is domiciled;

(B) shall specify the lines and classifications of liability insurance which the purchasing group intends to purchase;

(C) shall identify the insurance company from which the group intends to purchase insurance and the domicile of such company; and

(D) shall identify the principal place of business of the group.

(2) Such purchasing group shall notify the commissioner of any such State as to any subsequent changes in any of the items provided in such notice.

(e) A purchasing group shall register with and designate the State insurance commissioner of each State in which it does business as its agent solely for the purpose of receiving service of legal documents or process, except that such requirement shall not apply in the case of a purchasing group —

(1) which —

(A) was domiciled before April 1, 1986; and

(B) is domiciled on and after September 25, 1981;

in any state of the United States;

(2) which —

(A) before September 25, 1981, purchased insurance from an insurance carrier licensed in any State; and

(B) since September 25, 1981, purchases its insurance from an insurance carrier licensed in any State;

(3) which was a purchasing group under the requirements of this chapter before October 27, 1986; and

(4) as long as such group does not purchase insurance that was not authorized for purposes of an exemption under this chapter as in effect before October 27, 1986.

(f) A purchasing group may not purchase insurance from a risk retention group that is not chartered in a State or from an insurer not admitted in the State in which the purchasing group is located, unless the pur- chase is effected through a licensed agent or broker action pursuant to the surplus lines and regulations of such State.

(g) Nothing in this chapter shall be construed to affect the authority of any State to make use of any of its powers to enforce the laws of such State with respect to which a purchasing group is not exempt under this chapter.

(h) Nothing in this chapter shall affect the authori- ty of any State to bring an action in any Federal or State court.

STATEMENT OF THE CASE

A. Nature of the Case

Petitioners brought this action to enjoin respondents from violating both 15 U.S.C. §3903(f) and state law. Respondents had been soliciting medical doctors and entities to purchase medical malpractice insurance through them although respondents were not using a licensed agent or broker acting pursuant to Indiana's surplus lines law. Petitioners alleged jurisdiction in the District Court pursuant to 28 U.S.C. §1331 and 15 U.S.C. §3901, *et seq.*

The District Court found that it had jurisdiction to hear this case. Upon hearing evidence for a preliminary injunction, the District Court advanced the hearing on the merits and granted permanent relief. The District Court found that respondents were not only selling insurance without the necessary surplus lines agent, but were also perpetrating a fraud. The District Court froze the respondents' assets and ordered them to refrain from soliciting business in every state.

The Seventh Circuit, on appeal by the respondents, reversed the decision of the District Court on the grounds that the States do not enjoy a private right of action to enforce the provisions of 15 U.S.C. 3903 in the federal courts. The basis for the Seventh Circuit's decision had not been briefed prior to the Seventh Circuit's decision. This Court has not ruled upon this issue.

B. Facts

Ted Allen Combs is the president of Medical Liability Purchasing Group, Inc. (hereinafter "MLPG"). Combs was asked to incorporate MLPG by his uncle, Edmund Burke, a vice-president of Casualty Assurance Risk Insurance Brokerage Company (hereinafter "CARIB"), a Guam corporation. CARIB used Combs and MLPG as a front to solicit applications for medical malpractice insurance from doctors, hospitals, clinics, podiatrists, psychologists, and emergency medical technicians across the United States. The solicitations claimed

that CARIB is a competent United States domiciled carrier that reports to a United States Insurance Commissioner and files reports with the National Association of Insurance Commissioners. These solicitations were made despite the fact that the only state in which MLPG was registered as an authorized liability purchasing group was New Mexico, and that CARIB, the only insurer used by MLPG was licensed only in Guam.

MLPG maintained a mailbox in Jeffersonville, Indiana. However, all mail was forwarded to CARIB's Washington, D.C. office. In fact, telephone calls to MLPG were rerouted to the Washington, D.C. offices of CARIB. The solicitations sent out by MLPG were prepared by CARIB, and correspondence sent over Combs' signature stamp was prepared by CARIB.

Although Combs was aware that CARIB had been issued cease and desist orders in several states, he had not stopped soliciting business in those states. Indeed, although Combs had been advised by several states to cease activities as a purchasing group, MLPG continued its activities.

REASON FOR ALLOWANCE OF THE WRIT

THE SEVENTH CIRCUIT'S CONSTRUCTION OF 15 U.S.C. §3903 MAKES THE 1986 AMENDMENTS MEANINGLESS; UNDER THAT CONSTRUCTION, THE STATES HAVE NO POWER TO REGULATE PURCHASING GROUPS UNDER THE RISK RETENTION ACT.

The granting of a writ of certiorari in this case is necessary to resolve a new question of law, whether the states have a right to seek redress in federal courts to regulate purchasing groups under the Risk Retention Act, 15 U.S.C. §§3901-03. Since the states have been given the duty of regulating the insurance industry under the McCarran-Ferguson Act, 15 U.S.C. §§1011-15, if the states are not allowed to use all means available to regulate the insurance industry, no one will be available to regulate that aspect of the industry. This, therefore, is an important issue of federal law that has not been, but should be,

settled by this Court. Rule 10.1(c), Rules of the United States Supreme Court.

In 1981, Congress passed the Product Liability Risk Retention Act of 1981, Pub. L. 97-45, 95 Stat. 949, 15 U.S.C. §§3901-03. As noted in the Seventh Circuit's decision, Slip Opinion, pp. 1 and 2, the Product Liability Risk Retention Act overrides the privilege states otherwise enjoy under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, to regulate all aspects of insurance, by exempting risk retention groups and most purchasing groups from state regulation. The Product Liability Risk Retention Act has been amended twice, once in 1983 and again in 1986. The construction to be given to the 1986 amendments is the issue here.

The 1986 amendments to the Product Liability Risk Retention Act added subsections (d) through (h) to §3903. Those amendments have been set out in full on pages 3 through 5, *supra*.

In construing statutes, the courts should not give a construction that would render certain provisions superfluous or insignificant or seriously impair the effectiveness of the statute. *Sunshine Anthracite Coal Company v. Adkins*, 310 U.S. 381 (1940); *Bird v. United States*, 187 U.S. 118 (1902); *see also*, *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981). Rather, the courts must assume that Congress intended its enactments to have meaningful effect. Statutes should be construed, if possible, to give them such effect. *United States v. American Trucking Associations, Inc., et al.*, 310 U.S. 534 (1940); *The Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); *see also*, *National State Bank of Elizabeth, N. J. v. Smith*, 591 F.2d 223 (3rd Cir. 1979). Indeed, interpretations of a statute which would produce absurd results should be avoided. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982).

The legislative history of the 1986 amendments as they relate to purchasing groups is scant, at best. However, on pages 17-18 of House Report No. 99-865, 1986 U. S. Code Congressional and Administrative News, pp. 5314-5315, the Committee dis-

cussed the addition of subsections (d) and (e). The Committee stated:

> The Committee has been presented with allegations regarding commercial abuses by organizations purporting to act under color of the exemptions provided by the 1981 Act. *The provisions of this section have been added to the law to provide the States with improved ability to monitor for and take action to prevent abuses from occurring.* The notice requirements are designed to give the insurance regulator notice and opportunity to exercise regulatory oversight and the requirement regarding registration for service of process is intended to facilitate appropriate corrective action by eliminating the possibility that the commissioner will have difficulty providing adequate notice to the group or serving appropriate legal process. (Emphasis added.)

Clearly, there is an intent expressed by Congress that the states' regulatory functions, as regards purchasing groups, are expanded under the amendments.

Curiously, the legislative history is silent regarding subsection (h) of §3903. However, the fact that that subsection was added must have some meaning. If the states do not have standing to bring actions to enforce the Risk Retention Act, then the addition of subsection (h) is meaningless. Unless the states have authority to bring an action under this chapter, the language of subsection (h) is senseless. Rather, the spirit of the 1986 amendments, as regarding purchasing groups, intentionally expands the role of the states to monitor and regulate purchasing groups. However, if the states lack standing to enforce the 1986 amendments, then those amendments have no enforcement mechanism at all. Such an interpretation leads to an absurdity and should be avoided.

Under the Seventh Circuit's decision, if a purchasing group which operates in all the states is operating in violation of the Risk Retention Act, such as Medical Liability Purchasing Group, Inc. of Indiana was found by the District Court to be so

operating, a state cannot seek to stop the purchasing group's illegal activity in any state other than its own. Under the Seventh Circuit's decision, each of the fifty states would be required to bring actions in state courts to cause the miscreant purchasing group to cease its interconnected illegal activities which violate *federal* law. This result is not tenable and cannot have been intended by Congress. Federal jurisdiction is clearly present under 28 U.S.C. §1331 because of 15 U.S.C. §3903(d) through (h); the *Illinois v. Life of Mid-America Insurance Co.*, 805 F.2d 763 (7th Cir. 1987), and RICO analogy made by the Seventh Circuit *does not fit* the legislative history of *this* act.

The Risk Retention Act, as originally passed, was intended to benefit certain segments of the public by exempting purchasing groups from excessive regulation by the states. However, by the time of the 1986 amendments, Congress realized that such total freedom from regulation was not wise. As shown above, the 1986 amendments were adopted to return to the states the power to regulate certain aspects of the activities of purchasing groups. The purpose of state regulation is to prevent abuses by unscrupulous insurance providers. If the states lack the ability to enforce the consumer-oriented provisions of the Risk Retention Act in federal courts, then no one will be left to enforce the act. By Congressional design, the insurance industry is regulated by the states, not the federal government. Clearly, Congress could not have intended to give the states specific regulatory rights and duties without conferring upon them the right to enforce those rights in a forum with national enforcement powers. Indeed, the wording of 15 U.S.C. §3903(h) clearly implies that Congress intended the states to be able to bring an action in federal court to enforce the amendments. Any other interpretation of the amendments eviscerates the statute.

Unless the states can use all means necessary to protect the public from improper activities, as those found by the District Court to have been perpetrated by Combs and MLPG, the public will lie prey to such unscrupulous actors as Combs and

MLPG. This cannot be the intent of the 1986 amendments to the Risk Retention Act.

The 1986 amendments to the Risk Retention Act must have meaning. The Seventh Circuit's decision holding that the State of Indiana lacks standing to bring suit in District Court deprives the amendments of any real meaning. Therefore, this Court should grant the petition for a writ of certiorari, review the decision of the Seventh Circuit, reverse the deci- sion of the Seventh Circuit, and affirm the decision of the District Court.

CONCLUSION

The United States Court of Appeals for the Seventh Circuit erred in determining that the States do not have a direct right of action to enforce the Risk Retention Act in federal court. This is an important question of law that has not been settled by this Court. Therefore, the Petitioners, John J. Dillon III, Commissioner of the Department of Insurance of the State of Indiana, and the Department of Insurance of the State of Indiana, respectfully pray the Court grant this Petition for Writ of Certiorari to review the decision of the Seventh Circuit.

Respectfully submitted,

Linley E. Pearson
Attorney General of Indiana

Terry G. Duga
Deputy Attorney General

TGD/mt:7099D

APPENDIX

No. 89-2550

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

United States Court of Appeals

April 3, 1990

Before

HON. HARLINGTON WOOD, JR., CIRCUIT JUDGE
HON. JOEL M. FLAUM, CIRCUIT JUDGE
HON. FRANK H. EASTERBROOK, CIRCUIT JUDGE

JOHN J. DILLON III, Commissioner of Insurance, and the DEPARTMENT OF INSURANCE OF THE STATE OF INDIANA, *Plaintiffs-Appellees*, No. 89-2550 v. TED ALLEN COMBS, and MEDICAL LIABILITY PURCHASING GROUP, INC., OF INDIANA, *Defendants-Appellants*.	Appeal from the United States District Court for the Southern District of Indiana, New Albany Division. No. NA 89-72-C S. Hugh Dillin, *Judge*

ORDER

Plaintiffs-Appellees filed a petition for rehearing and suggestion of rehearing en banc on March 1, 1990. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

In the
United States Court of Appeals
For the Seventh Circuit

No. 89-2550

JOHN J. DILLON III, Commissioner of the Department of Insurance of the State of Indiana, and the DEPARTMENT OF INSURANCE OF THE STATE OF INDIANA,

Plaintiffs-Appellees,

v.

TED ALLEN COMBS, individually and as President of Medical Liability Purchasing Group, Inc., of Indiana, and MEDICAL LIABILITY PURCHASING GROUP, INC., OF INDIANA,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Indiana, New Albany Division.
No. NA 89-72-C—**S. Hugh Dillin**, *Judge*.

ARGUED JANUARY 26, 1990—DECIDED FEBRUARY 15, 1990

Before WOOD, JR., FLAUM, and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Concerned that state laws frustrated the formation of "purchasing groups" to serve as intermediaries in the insurance business, Congress enacted the Product Liability Risk Retention Act of 1981, Pub. L. 97-45, 95 Stat. 949, 15 U.S.C. §§ 3901-03. This statute overrides the privilege states otherwise enjoy under the McCarran-Ferguson Act to regulate all aspects of

the insurance business. Section 3903 exempts most "purchasing groups" (that is, middlemen between clients and insurers) from state regulation. Many an exemption has a catch. In 1986 Congress concluded that the original bill went too far, and while making other changes the legislature added §3903(f), which provides:

> A purchasing group may not purchase insurance from a risk retention group [*i.e.*, an underwriter] that is not chartered in a State or from an insurer not admitted in the State in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such State.

Pub. L. 99-563, 100 Stat. 3178. "Surplus lines laws" refer to assigned risk pools, and the principal function of §3903(f) is to require a purchasing group that does not use an underwriter licensed in the state to employ the same procedures—including registering as an agent or broker, or placing insurance through one—as other assigned risk intermediaries.

Indiana believes that Ted Allen Combs and his Medical Liability Purchasing Group, Inc., of Indiana, are violating both state law and §3903(f) by soliciting purchases of medical malpractice insurance without using "a licensed agent or broker acting pursuant to [Indiana's] surplus lines laws". Combs holds a license to sell insurance in Indiana. He tried to register to sell surplus lines insurance, but state officials turned him down on the ground that *no one* may sell surplus lines insurance for medical malpractice in Indiana, because that state has its own assigned risk pool. Because the state's pool accepts all applicants, Indiana is of the view that there is no need for private surplus lines agents or brokers. Combs responds that this approach would make hash of the general rule in §3903(a)(1), (8) that purchasing groups are exempt from state laws that "prohibit the establishment of a purchasing group" or "otherwise discriminate against a purchasing group". Indiana told Combs and his firm to stop soliciting. They ignored the

demand, and Indiana sued. Indiana argued, and the district court found, that Combs and his firm not only are selling without the necessary surplus lines agent but also are perpetrating a fraud, representing that they place policies with reputable insurers licensed in the United States when all the business went to Casualty Assurance Risk Insurance Brokerage Company, an affiliated enterprise (run by Combs' uncle) incorporated in Guam and not licensed to underwrite in any state. The district judge froze the defendants' funds and ordered them to stop soliciting business in every state.

The only issue we need decide is whether there is jurisdiction. Indiana invoked federal-question jurisdiction, 29 U.S.C. §1331, on the theory that Combs and firm are "violating" §3903(f) as well as state law. It is far from clear to us that §3903(f) contains a rule that could be "violated", as opposed to limits on the scope of the preemption established by the rest of §3903. Despite the mandatory language of §3903(f), the section as a whole (indeed, the statute as a whole) is designed to preempt state laws that hamper purchasing and risk retention groups. Everyone assumed that if preemption were unavailable, state law would govern. Indiana has a law much like §3903(f). See Ind. Code §27-7-10-27(a). It concedes that it could have filed this suit in state court and obtained personal jurisdiction over both defendants. If federal preemption fails, the legal obligations are established by state law, and there is no federal question. See *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983); *Christianson v. Colt Industries Operating Corp.*, 108 S. Ct. 2166, 2173-75 (1988). If, however, §3903(f) establishes an independent obligation, then there might be jurisdiction under §1331 even though state law also proscribes the same acts.

We need not decide whether §3903(f) imposes legal obligations (as opposed to delimiting the extent of preemption). A federal rule of decision is necessary but not sufficient for federal jurisdiction. There must also be a right of action to enforce that rule. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 807-12 (1986). Sec-

tion 1331 does not furnish it. Unless the defendant is a state actor, so that 42 U.S.C. §1983 may supply the right of action, see *Golden State Transit Corp. v. Los Angeles*, 110 S. Ct. 444 (1989), the entitlement to enforce the federal rule generally must be found within the statute in question. Here Indiana comes up short: the Risk Retention Act does not create a private right to enforce §3903(f). Quite the contrary, §3903(g) says that "[n]othing in this chapter shall be construed to affect the authority of any State to bring an action in any Federal or State court." See also §3903(e). A law that does not "affect" the ability of a state to sue hardly creates a right of action. Another part of the Risk Retention Act, 15 U.S.C. §3906, added in 1986, does create a federal right of action. Section 3906 says that a district court may enjoin a risk retention group from underwriting insurance if "such group is in hazardous financial condition." Combs' firm is a purchasing group, not a risk retention group. The express right of action in §3906 stands in contrast to the no-effect clause of §3903(g). What remains is the conclusion that there is no private right of action to enforce §3903(f) in federal court.

Indiana believes that Combs and firm committed fraud by using the mails, and some federal anti-fraud laws contain express rights of action. Prominent among these is the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1964. Indiana does not contend, however, that *it* is a victim of fraud, and RICO does not authorize a state to obtain relief on account of a fraud practiced against its residents. *Illinois v. Life of Mid-America Insurance Co.*, 805 F.2d 763 (7th Cir. 1986); *New York v. Seneci*, 817 F.2d 1015 (2d Cir. 1987). RICO allows suits by the federal government, §1964(b), but otherwise only by persons injured in their "business or property", §1964(c), a phrase that does not include sovereign or derivative interests. *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); cf. *Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985). A state has its own laws and ample access to its own courts, through which it may protect its residents

from fraud. No other express right of action comes to mind (the state suggests none), which leaves us in the usual position that when Congress did not enact a right of action, there is no federal jurisdiction.

Cases such as *Cort v. Ash*, 422 U.S. 66 (1975), hold open the possibility that clear legislative history, with statutory language creating personal entitlements, may create a right of action even though the statute is silent. Section 3903 is a prohibitory rule, not a statute creating entitlements. Compare *Cannon v. University of Chicago*, 441 U.S. 677 (1979), with *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). Any entitlements would belong to those who seek to purchase insurance, not to state regulatory agencies. The Risk Retention Act as a whole is designed to throttle the states, not to empower them. And the legislative history is silent. Committee reports describe the substance of §3903(f) without hinting that the rule would be enforceable in federal litigation. H.R. Rep. No. 99-865, 99th Cong., 2d Sess. 17 (1986). Compare *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982), with *Karahalios v. National Federation of Federal Employees*, 109 S. Ct. 1282 (1989).

Text, structure, and history of §3903(f) all point to nonenforcement in federal court. States possess ample power to enforce in their own courts not only the principles of state law (to the extent they survive preemption) but also anything §3903(f) adds to state rules. The judgment of the district court is vacated, and the case is remanded with instructions to dismiss the complaint for want of jurisdiction.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

BETTYE L. FOY, as Acting Commissioner of the Department of Insurance of the State of Indiana,
THE DEPARTMENT OF INSURANCE OF THE STATE OF INDIANA,

Plaintiffs, NO. NA 89-72-C

-vs-

TED ALLEN COMBS, Individually and as President of Medical Liability Purchasing Group, Inc., of Indiana,
MEDICAL LIABILITY PURCHASING GROUP, INC. OF INDIANA,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard on plaintiff's application for a preliminary injunction. Plaintiffs and the defendant corporation appeared by counsel; the defendant Ted Allen Combs appeared in person and by counsel. The Court, having heard the evidence, and being fully advised, now makes the following findings of fact and conclusions of law:

Findings of Fact

1. The Indiana Department of Insurance (the Department) is an agency of the State of Indiana, created pursuant to Indiana Code 27-1-1-1 *et seq.*, and is solely charged with enforcement of all insurance laws affecting citizens in the State of Indiana, pursuant to the Risk Retention Act of 1981 and the 1986 amendments thereto, as codified at 15 U.S.C. §3903 *et seq.*

2. Bettye L. Foy is the duly appointed Acting Commissioner of Insurance for the State of Indiana and as the legal representative of the Department, is authorized by law to bring an action for injunctive relief against an Indiana-domiciled corporation seeking registration as a purchasing group.

3. Ted Allen Combs (Combs) is President of defendant Medical Liability Purchasing Group, Inc. of Indiana (MLPG) and one of the two members of the Board of Directors of MLPG. MLPG was issued a Certificate of Incorporation by the Indiana Secretary of State on July 22, 1988. Combs was issued a property and casualty insurance agent's license by the Department on September 15, 1988 but has been denied licensure as an Indiana surplus lines agent, which said license denial matter is presently under petition for administrative review pursuant to the Indiana Administrative Adjudication Act, I.C. 4-21.5-1-1 *et seq*. MLPG is nonregistered as a purchasing group in all states except New Mexico.

4. Combs was loaned the start-up money for MLPG from Ed Burke, a Vice-Presidnet of Casualty Assurance Risk Insurance Brokerage Company (CARIB). CARIB is not admitted as an insurer in any state. It is incorporated in Guam. CARIB employees drafted the solicitations sent by MLPG to healthcare providers, negotiated with the company which provided the list of doctors solicited, and designed MLPG's letterhead. Also, CARIB employees receive and open all of MLPG's mail, and handle all telephone inquiries. MLPG has never paid for these services. MLPG's "office" in Jeffersonville, Indiana is a storefront containing only a desk, one chair and a telephone. There are no employees. Combs has resided since January, 1989 in Washington, D.C., and does business from CARIB's offices, where he is receiving "training." MLPG's address is a post office box in Jeffersonville, Indiana. All mail sent to that post office box is forwarded to CARIB's Washington, D.C., office for handling by CARIB. MLPG does not have a telephone number in its name. All calls to the telephone number on its mail solictiations are transferred via call forwarding to CARIB's Washington, D.C., office. MLPG's check-

ing account requires the signature of L. Allen Bramson, a Vice-President of CARIB, for all withdrawals and checks, including the paychecks of Combs. Combs' salary negotiated by Ed Burke, a Vice-President of CARIB, who happens to be Combs' uncle. Martin Jano, President of CARIB, who is an attorney, writes the majority of MLPG's letters, which are signed with the rubber-stamp signature of Ted Allen Combs. Combs has not seen much of the correspondence sent or received by MLPG. John James, who also writes letters as an "administrative assistant" to Combs, is a cousin of Martin Jano. Combs has never met John James, who lives in Guam.

5. Title 15 U.S.C. §3901(5) defines a "purchasing group" as "any group which — (A) has as one of its purposes the purchase of liability insurance on a group basis; (B) purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in subparagraph (C); (C) is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations; and (D) is domiciled in any State." MLPG has never purchased insurance on a group basis.

6. On or about September 15, 1988, Combs, as President of MLPG, forwarded documents to the Department seeking to qualify MLPG as an Indiana-domiciled purchasing group. On September 30, 1988, MLPG was requested by the Indiana Attorney General to cease and desist purchasing group activities on the basis that it was not properly registered as a purchasing group under 15 U.S.C. §3901 *et seq.* and I.C. 27-7-10-1 *et seq.*

7. Title 15 U.S.C. §3903 provides: "A purchasing group may not purchase insurance from a risk retention group that is not chartered in a State or from an insurer not admitted in the State in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such State."

8. Indiana law regarding surplus lines insurance defines all such business in terms of surplus lines agents, as surplus lines insurance business is that which a licensed agent "after diligent effort was unable to procure from any authorized insurer or insurers authorized to transact the particular class of insurance business in Indiana the full amount of insurance required to protect the insured, and that such insurance as may be placed under the provisions of the chapter is not placed for the purpose of procuring it at a premium rate lower than would be accepted by any insurer authorized and licensed to transact such insurance business in Indiana." I.C. 27-1-15.5-5(c). MLPG has never had an Indiana-licensed surplus lines agent through which to place business and has never made any effort to procure malpractice insurance from an insurer authorized to transact such business in Indiana.

9. Medical malpractice insurance cannot be sold in Indiana under surplus lines laws because Indiana has the Indiana Residual Malpractice Insurance Authority (IRMIA), established pursuant to the Indiana Medical Malpractice Act (I.C. 16-9.5-1 *et seq.*), which accepts any healthcare providers who cannot obtain malpractice coverage from an Indiana-admitted insurer. IRMIA has never refused coverage to any healthcare provider; therefore, it would not be possible for a surplus lines agent to meet the "diligent effort" requirement of I.C. 27-1-15.5-5(c)(4) in order to place medical malpractice business with an authorized insurer.

10. MLPG has only had CARIB as an insurer. CARIB is domiciled in Guam and is not admitted as an insurer in Indiana or any other State. MLPG has never had an Indiana-licensed surplus lines agent for placement of business with CARIB. Therefore, pursuant to 15 U.S.C. §3903, MLPG cannot be registered as a purchasing group in Indiana. The lack of an Indiana admitted insurer and failure to qualify under surplus lines laws of Indiana are the basis of the Department's denial of MLPG's registration as a purchasing group.

11. MLPG has mailed several thousand medical malpractice insurance solicitations to physicians and other healthcare pro-

viders all over the United States which state: "Medical Liability Purchasing Group, Inc. of Indiana is an authorized liability purchasing group formed under Indiana law and the 1986 'Federal Risk Retention Act' that authorizes a purchasing group to obtain difficult to find and expensive liability coverage for its members only. Our Association has obtained a qualified and competent United States domiciled carrier to service the medical malpractice liability needs of our members. Our carrier reports to a United States insurance commission, files quarterly statements and annual statements with the National Association of Insurance Commissioners (N.A.I.C.) and has the financial strength and reinsurance connections to support the integrity of the policy issued. . . . Our association of more than 4,000 members has the bargaining power to obtain less than a company's usual market rates for it's members with licensed U.S. companies and not any off-shore captives or foreign companies."

These statements, which have induced thousands of physicians and other healthcare providers who received them to purchase insurance through CARIB, are false and deceptive for the following reasons:

a. Medical Liability Purchasing Group, Inc. of Indiana has never been registered as a purchasing group in Indiana or under Indiana law or the 1986 Federal Risk Retention Act.

b. CARIB, the only insurer of MLPG, is domiciled in Guam, which is not a State of the United States; therefore CARIB is not a United States domiciled carrier.

c. CARIB has never been licensed as a insurer in any State.

d. Being domiciled in Guam, CARIB is both foreign and off-shore.

e. CARIB is not recognized by the National Association of Insurance Commissioners.

f. The Insurance Commissioner of Guam, Joaquin Blaz, described CARIB as being in its "infancy" and warned the Department in October of 1988: "We suggest that you be very cautious in admitting this company to do business in your jurisdiction." Therefore, CARIB lacks the "financial strength" claimed in its solicitations.

g. MLPG is merely a front for CARIB, an insurer not authorized in any State.

12. MLPG has continued to mail solicitations for medical malpractice insurance in the following States, despite being ordered or requested to cease and desist purchasing group activities: Hawaii, Florida, Washington, Wisconsin, Kentucky, Maryland, Idaho, Pennsylvania, North Dakota, and Indiana.

13. MLPG has further violated 15 U.S.C. §3901(5) as follows:

a. There is no group liability policy; each "member" of MLPG who has purchased insurance from CARIB has an individual policy of insurance.

b. The "members" of MLPG have dissimilar business activities; MLPG "members" include a substantial number of entities, such as clinics, as well as osteopaths, medical doctors from every medical specialty, hospitals, nurses, therapists and counselors.

14. The operation of MLPG is merely a front for CARIB's direct-mail solicitation for medical malpractice business. On CARIB's 1987 Annual Statement, it listed $1,202,492 as the amount of premium it received throughout the United States, none of which came from Guam. In 1988, CARIB's Annual Statement lists $3,235,293 in premium collected throughout the United States, also with none from Guam, the only place it is qualifed to do business as an insurer. All or most of the premium received by CARIB, as reflected on its 1988 Annual Statement, came as a result of its direct-mail solicitation under the guise of MLPG.

Conclusions of Law

1. The Court has jurisdiction of the subject matter of this action. 28 U.S.C. §1331.

2. There is no possibility that the facts above found would change on a further hearing. Therefore, trial on the merits is advanced and consolidated with the hearing of the application for a preliminary injunction. Rule 65(a)(2), F.R.Civ.P.

3. The defendants are in violation of the laws of the United States, including, but not limited to the Risk Retention Act, 15 U.S.C. §3901, *et seq.*, and the laws relating to mail and wire fraud, 18 U.S.C. §§1341, 1342, and 1343.

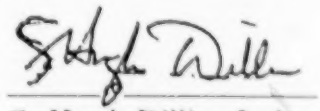
4. Plaintiffs are entitled to a permanent injunction against the defendants, enjoining them from the authorized transaction of purchasing group business within the State of Indiana and all other States, territories and possessions of the United States; from soliciting applications for medical malpractice liability insurance and from collecting or receiving premiums in Indiana or any other State, territories or possessions of the United States; and from making payment on any claims pursuant to any policy from any account maintained with a financial institution or other entity in which any premiums collected from healthcare providers solicited via MLPG have been deposited.

5. Such injunction will serve the public interest, without which plaintiffs and the public would be irreparably injured, as having no adequate remedy at law.

6. The defendants should be ordered to supply the Department with an accounting of all funds or premiums collected by defendants pursuant to any purchasing group activities and to account for all disbursements of such funds, to supply the Department with a complete list of the names and addresses of each and every healthcare provider solicited for medical malpractice insurance; and to produce to the Department all documents in their possessions or control relating or referring to their activities, within thirty (30) days from this date.

7. The defendants should also be ordered to provide the Department with the name of each and every financial institution or other entity in which any premiums or commissions received from healthcare providers solicited via MLPG have been deposited and with each respective account number therefor within twenty (20) days from this date, and to refrain from withdrawing or expending any funds received from purchasing group activities until further ordered by this Court.

Dated this 22nd day of June, 1989.



S. Hugh Dillin, Judge

Copies to:

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James L. Petersen, One American Square, Box 82001, Indianapolis, Indiana 46282

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

BETTYE L. FOY, as Acting Commissioner of the Department of Insurance of the State of Indiana,
THE DEPARTMENT OF INSURANCE OF THE STATE OF INDIANA,

Plaintiffs,) NO. NA 89-72-C

-vs-

TED ALLEN COMBS, Individually and as President of Medical Liability Purchasing Group, Inc., of Indiana,
MEDICAL LIABILITY PURCHASING GROUP, INC. OF INDIANA,

Defendants.)

ORDER AND JUDGEMENT

This cause having been heard by the Court, and the Court having this day filed its Findings of Fact and Conclusions of Law, reading as follows (H.I.)

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Ted Allen Combs and Medical Liability Purchasing Group Inc., of Indiana (MLPG) are enjoined from the unauthorized transaction of purchasing group business within the State of Indiana and all other states, territories and possessions of the United States.

2. Ted Allen Combs and MLPG are enjoined from soliciting applications for medical malpractice liability insurance and from collecting or receiving premiums in Indiana or any other States, territories or possessions of the United States.

3. Ted Allen Combs and MLPG are enjoined from making payment on any claims pursuant to any policy from any account maintained with a financial institution or other entity in which any premiums collected from healthcare providers solicited by MLPG have been deposited.

4. Ted Allen Combs and MLPG are ordered to supply The Department of Insurance of the State of Indiana (the Department) with an accounting of all funds or premiums collected by defendants MLPG and Ted Allen Combs, individually and as President of MLPG, pursuant to any purchasing group activities and to account for all disbursements of such funds within thirty (30) days of this order.

5. Ted Allen Combs and MLPG are ordered to supply the Department with a complete list of the names and addresses of each and every healthcare provider solicited for medical malpractice insurance within thirty (30) days from the date of this order.

6. Ted Allen Combs and MLPG are ordered to provide the Department with the name of each and every financial institution or other entity in which any premiums or commissions received from healthcare providers solicited by MLPG or Ted Allen Combs have been deposited and with each respective account number therefor within twenty (20) days of this order.

7. Ted Allen Combs and MLPG are ordered to produce to the Department all documents in their possession or control relating or referring to their purchasing group activities within thirty (30) days from the date of this order.

8. Ted Allen Combs and MLPG are ordered to refrain from withdrawing or expending any funds received from purchasing group activities until the further order of this Court.

So ORDERED this 22nd day of June, 1989.

S. Hugh Dillin, Judge

Copies to:

Linley E. Pearson, Attorney General of Indiana, 219 State House, Indianapolis, Indiana 46204 (Samuel L. Bolinger, Deputy)

James L. Petersen, One American Square, Box 82001, Indianapolis, Indiana 46282

90-25

No. 89-2550

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JOHN J. DILLON III, Commissioner of the Dept. of Insurance of the State of Indiana and the DEPT. OF INSURANCE OF THE STATE OF INDIANA,

Petitioners,

v.

TED ALLEN COMBS, Individually and as President of Medical Liability Purchasing Group, Inc. of Indiana, and MEDICAL LIABILITY PURCHSING GROUP, INC. OF INDIANA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The question presented for review is not as Petitioner suggests, but rather whether the Seventh Circuit Court of Appeals correctly decided that the United States District Court lacked subject matter jurisdiction to hear Petitioner's claim, when that claim involves alleged violations of its own state law, by an entity created by that state, committed by a resident of that state.

Answer: The Respondent answers yes.

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JOHN J. DILLON III, Commissioner of the Dept. of Insurance of the State of Indiana and the DEPT. OF INSURANCE OF THE STATE OF INDIANA,

Petitioners,

v.

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RESPONDENTS' BRIEF IN OPPOSITION

SUMMARY OF THE ARGUMENT

For the prior certificate of interest, statement of jurisdiction, statement of issues, statement of the case and statement of the facts, the Court is respectfully directed to Defendant-Appellant's brief and appendix filed with the Seventh Circuit Court of Appeals on October 12, 1989, as attached hereto as an Appendix, pages 1a-32a. For arguments concerning issues which the panel did not reach due to the fact that the subject matter jurisdiction was lacking, Respondent feels they need not address those issues at this time. This response brief deals only

with the Plaintiff-Appellants Petition for Writ of Certiorari filed with this Court, and specifically addresses the jurisdictional questions, not the merits of the case.

STATEMENT OF CASE

On or about June 22, 1989, the United States District Court for the Southern District of Indiana, New Albany Division, (hereinafter referred to as District Court), entered an Order based on an expedited advancement of trial from which Respondent appealed to the United States Seventh Circuit Court of Appeals, (hereinafter referred to as Seventh Circuit). On or about February 15, 1990, the United States Seventh Circuit Court of Appeals reversed the United States District Court for the Southern District of Indiana, New Albany Division, dismissing the cause of action filed by Petitioners for lack of jurisdiction holding that the U.S. District Court lacked subject matter jurisdiction to hear the case. They remanded the case back to the District Court with instructions to dismiss. We respectfully refer the Court to Petitioners brief for appropriate copies of prior proceedings.

Petitioner then filed a Petition to the Seventh Circuit for re-hearing and suggestion of re-hearing en banc which was denied on or about April 3, 1990. Petitioner now seeks a petition for Writ of Certiorari with this Honorable Court requesting relief from the Seventh Circuit Court of Appeals decision that the U.S. District Courts lacked subject matter jurisdiction over the right of petitioner to seek redress in the federal court.

REASON FOR DENYING THE WRIT

Although Petitioner will tell you that the granting of this writ is necessary to resolve a new question of law, they overlook the overriding concern; specifically, that in order to hear an issue or to "resolve a new question of law", it is first necessary that the Court have juris-

diction over the subject matter of the litigation. Petitioner has infiltrated his brief with his "alleged facts" in an effort to potentially sway the Court by painting a negative scenario. The court will note that the Respondents brief to the Seventh Circuit points out that the "negative scenario" was a portrait painted by the State of Indiana and supported by the State drafting it's own documents. That's kind of like the fisherman who tells you he caught the "big one" and then produces his own affidavit to support his contention. I suggest to the Court that it did not work in the Seventh Circuit, and it will not work here.

We will not spend a lot of time discussing merits, as we do not believe them to be relevant here. We would defer much of that argument to the Brief previously filed on behalf of the Respondent. We would, however, be remiss if we did not at least make mention of the fact that the "hearing" in the District Court we believe fell far short of providing Respondent with the Constitutional safeguards afforded to him, and further, the haste with which the finding of fact and conclusions of law were made casts some doubt on the credibility of same. This is particularly so when the thrust of the findings against this respondent were based upon speculative accusations about a third party who was neither a party to the proceedings nor present to defend itself. The State of Indiana wanted Respondent to play the game by the rules, but when he tried, they unilaterally changed the rules so that he couldn't play. Enough said . . . . on the Petition.

Respondent hereby adopts the Argument in it's brief filed in the Court below as it applies to jurisdiction. Before the court can get to the merits of a claim or get to the point where any question of law may be ruled upon, I think we can all agree that the Court must have jurisdiction. Jurisdiction is the foremost and essential ingredient in the recipe of case law. This case is not one containing that foremost, essential ingredient.

This is a case involving strictly one state's purported right to sue in Federal Court for violations of that very state's law, by a Company formed and promulgated under that same state's laws, and against an individual who is a resident of that same state. I am referring, of course to the State of Indiana.

We must be cognizant of the fact that Petitioners are not without a proper forum to air their accusations. The State Courts of Indiana are still a viable alternative to them if they wish to pursue their claims. The alleged violations Petitioners claim to have occurred are all purported violations of Indiana Law.

Petitioners, in essence ask "Where then does the Federal Court have Jurisdiction in a case such as this?" The answer is that it does not. Like the recipe mentioned above, you can't make spaghetti without pasta or noodles . . . and you can't get to the merits without jurisdiction! Respondent avers that Petitioner chose the wrong forum.

The Seventh Circuit was correct when they held that the trial Court lacked subject matter jurisdiction over this action.

Although the *Liability Risk Retention Act*, (15 U.S.C. Section 3901, et seq. (1989 supp.) hereinafter called "the Act") removed impermissible State barriers to the formation of liability purchasing groups, Petitioners alleged cause of action still arose solely under Indiana law. The petitioner failed to allege or show that the Respondents violated any federal laws.

Seventh Circuit's construction of the Act, Respondent believes, reflects the only sensible interpretation of the legislation. To impute the standards Petitioner suggests, would certainly open the proverbial floodgates of litigation and cause States to potentially seek redress in Federal Court for that which they could otherwise address in their own State. This is especially so, when the State has its own remedy in its own courts. Where is the ju-

risdictional basis in the instant case? It does not lie in the federal court. There is no Constitutional issue raised by Petitioner; there is no violation of any federal law; and there certainly is no diversity since the purchasing group in question is domiciled within the State of Indiana, *Swanco Insurance Company—Arizona v. William D. Hager, Commissioner of Insurance of the State of Iowa*, 879 F.2d 353 (8th Cir. 1989). The State has its own options and presumably has its own remedies. Issues involving strictly intrastate functions and regulations over its own should never be a federal question. To bring these issues to the federal court for these things is not only onerous, but is tantamount to an abuse of process by a State seeking Federal redress for its own states alleged violations, aimed at an entity which was a creation of the State itself.

Federal Court was purposely segregated from the States to provide a fair forum for diversity situations where it was felt that a "visiting party" could not get a fair tribunal to hear its complaints. This is not the situation here. Jurisdictional arguments are perhaps most closely scrutinized when a State is seeking relief on behalf of one of its administrative departments.

Petitioner would have you believe that the Seventh Circuit decision makes the 1986 amendments to the *Liability Risk Retention Act, supra*, meaningless; that somehow the 1986 amendments to the Act confer some federal authority for the state to seek redress in the federal courts. We do not agree.

Under the construction promulgated by the Seventh Circuit Court of Appeals, no private cause of action, either implied or expressed, allow this Petitioner to seek redress in federal courts to regulate purchasing groups under the Act. The Act, enacted in 1981 and amended in 1986, specifically prevents States from regulating the formation of purchasing groups such as Medical Liability Purchasing Group, Inc., of Indiana ("MLPG"), Respond-

ent herein. The amendments provide for the states to exert control, to some degree, over them. The Act owes its' very existence to responding to state laws and regulations which previously, intentionally, discouraged the formation of purchasing groups. In fact, if you look closely at what the Petitioner is asking this court to do, we see that for the Court to adopt their theory of a jurisdictional basis, is to negate the very reason for the passing of the amendments to the Act itself. Petitioner is trying to argue merits when the jurisdiction doesn't exist. It just doesn't make judicial sense. Petitioner is trying to make spaghetti without the noodles.

We find its difficult to express the rationales behind the Seventh Circuit decision any better than they themselves did, and consequently we respectfully refer this Court to their discussion of the law and its legislative intent as found in the Appendix to the Petitioners brief.

Can it be that Petitioner is attempting to find jurisdition by saying that some federal law has been violated? If that is the case, I suggest that this is not only ludicrous, but is a very weak effort to attempt to go through the back door when you can't get through the front. The Act provides that no state may promulgate rules, laws or regulations which restrict the formation of purchasing groups. The Act provides limited exceptions which may allow a state to exert some minimal administrative control. The Indiana Department of Insurance ("the Department") takes those limited restrictions provided by the Act and attempts to base its argument that the Act implies some sort of private right of action in federal court on behalf of the State of Indiana. However, their argument is made in spite of the fact that the Act's language fails to explicitly provide for such a private cause of action. Furthermore, nothing in the Legislative history of the 1981 Act or its 1986 amendments indicate that a private cause of action should be implied. In fact, The Act provides no express right of action in federal

court on behalf of the states to enforce restrictions, or anything else, for that matter.

Let's look at this "implied private right of action" theory for a moment. Can we buy this argument? I think not. To do so really flies in the face of and is inconsistent with the entire statutory scheme.

In what we must see as a direct response to the 1986 amendments to the Act, Indiana passes legislation which permits the Indiana Department of Insurance to assert and/or to some extent control certain Indiana Risk Retention Groups (*Indiana Risk Retention Groups Act*, Indiana annotated section 27-7-10-1 et seq., (W 1989 Supp.) (Indiana Act). We must ask where does this enforcement take place? The answer is in the State of Indiana Courts, not Federal Court.

The Indiana Act recognizes itself as a preemptive act. It allows the Indiana Insurance Commissioner to enforce the Indiana laws "not specifically preempted by the Risk Retention Act of 1986", *Indiana Code annotated*, section 27-7-10-29 (W 1989 Supp.). Pursuant to the 1986 amendments to the Act, Indiana adopted an administrative scheme under which it could regulate risk retention groups. This scheme allows the Department to bring an action under Indiana law in the Indiana courts for any perceived violation of the Act. What more does the Petitioner want? The recipe is before him. All he has to do is go out and buy the noodles. Instead, he goes to the store and buys tomato paste. Again, no spaghetti and no jurisdiction!

Respondent contends again, therefore, that it would be contrary to the legislative scheme established by Congress and the Indiana legislature to imply any federal private right of action in the Act in favor of the Department when not only an adequate remedy in state court exists, but where the state has gone out of its' way to provide same.

Well, maybe you say the legislative history will have some impact on this jurisdictional question. It does, but the illumination it provides is not favorable to the Petitioners theory. The legislative history of the Act indicates that Congress did not intend to imply a private right of action on behalf of the states to enforce the Act at all. The Act was, as stated above, passed in response to state laws and regulations which intentionally discouraged the formation of insurance purchasing groups. See *1981 U.S. Code, Congresional and Administrative News,* P 1432. In fact, the legislative history of the 1981 Act finds absolutely no reference to a private right of action. We cannot make, therefore, even an argument when it is based on nothing. Again, no noodles.

Respondents therefore, submit to this Honorable Court that the facts of this case, when coupled with the legislative history, leads to the inescapable conclusion that the drafters of the original version of the Act never intended to create a federal private right of action in favor of the states, and we thus urge this Honorable Court to adopt the philosophy put forth by the court below and deny this petition.

Let's also look at the arguments proffered by Petitioner that the 1986 amendments to the Act may have some implied right of action reserved to the States. I don't see that argument either. The 1986 amendments to the Act fail to include any explicit private right of action for a state to proceed in a federal forum upon an alleged violation of that state's law by an entity of its own creation. The 1986 amendments simply expanded the regulations a state may enact. Congressional silence on the issue of a private right of action remains a key. Regulation of insurance has generally been left to the states and to state law since the enactment of the *McCarron-Ferguson Act*, 15 USC Section 10, 11, et seq. (1976). Congress expressly stated its intent that insurance matters be governed by states and state law. If

this Court ingrafts a federal private right of action on behalf of the states under the 1986 amendments to the Act, based on suppositions and speculation, Respondents suggest that such an interpretation of the Act would contravene Congress's express intent that such matters be left to state law. Again, there is no mention of this "private right" in the 1986 amendments' legislative history. There is simply nothing reasonable upon which to make the assumption Petitioner is asking us to make, and without that assumption, there simply is no jurisdiction.

Let's examine the question of whether an implied private right of action exists under a federal statute. This is more of a question of statutory construction (*Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 US 77, 91, 67, L. Ed. 2nd, 750, 101 S. Ct. 1571 (1981)). This Court in *Merell Dow Pharmaceutical Inc. v. Thompson*, 478 U.S. 804, 92 L. Ed. 2nd, 650, 106-SC-3229 (1986), provided that a federal statute must provide a right of action to enforce the federal rule of decision. Furthermore, this Court stated that the federal rule of decision is necessary but not alone sufficient for federal jurisdiction. The entitlement to enforce the federal rule generally must be found within the statute in question. See *Golden State Transit Corp. v. Los Angeles*, 110 S. Ct. 444 107 L. Ed. 2nd., 420 (1989).

This Court in *Merrell Dow, supra*, stated: "Article 3 gives federal courts power to hear cases arising under federal statutes . . . We have long construed the statutory grant of federal question jurisdiction as conferring a more limited power". This Court also stated that federal law must create the cause of action.

In the case at bar, state law created the cause of action; to wit, Mr. Combs and the MLPG alleged violation of Indiana law. Recalling that MLPG was created pursuant to and thus a creation of Indiana law, and also recalling that Mr. Combs was a resident of the State of

Indiana, I see no way to even plausibly suggest federal jurisdiction. This case, therefore, and its attendant issues is inescapably one for the Indiana state court alone and none other as the Seventh Circuit so found.

The bottom line of all of this is that no right of action to enforce the Act in Federal Court is expressed, nor is there a basis to imply same, in either the original Act or its amendments where all allegations involve the very State seeking relief. The petitioner has its own laws and ample access to its own courts to which it may look to protect its residents from whatever they deem its residents need protection from.

The reason the Seventh Circuit of Appeals decision does not, therefore, render the 1986 amendments to the Act meaningless is because the states have the power granted to them by the amendments to do that which Petitioner seeks. He is just looking to the wrong place to seek it. Recall earlier, I indicated that it was pursuant to the 1986 amendments to the Act, that Indiana enacted its' state legislation (which, by the way, is to be litigated in its own state courts and not in federal court) for the very purpose herein involved. We suggest that the Petitioner seek his remedy in the forum provided him by his own State instead of coming incorrectly to the federal court.

The Act fails to give petitioner a right of action in the federal courts either explicitly or implicitly. Many federal and Supreme Court decisions express the view that a private right of action must be found within a statute and that Congress knows how to so provide and does so when that is the Congressional intent. To proceed in federal court, the federal issue must be one of significance which directly effects the outcome or resolution of the case. The federal issue must be well pled and cannot be speculative or based on theory. The case at bar is not well pled, and is based almost exclusively on speculation and blind conjecture.

In the instant case, the original issue was whether Mr. Combs or the MLPG violated Indiana law. Petitioner incorrectly relied on the amendments of the Act to pursue these issues in federal court. Respondents submits no sufficient connection between the Act and the allegations Mr. Combs warrant federal subject matter jurisdiction. The intended interpretation of the Act and its amendment is not relevant to the main issue in the original pleadings which commenced this cause of action.

CONCLUSION

Respondent submits that the Seventh Circuit Court of Appeals correctly decided that this case lacked federal subject matter jurisdiction and respectfully request that this Court affirm the decision of the Seventh Circuit Court of Appeals that no federal subject matter jurisdiction exists, and sends the Petitioner back to his own State to look for noodles.

Respectfully, we pray this Court deny the Petitioner Writ of Certiorari.

Respectfully submitted,

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(301) 964-9181
Attorney for Ted Combs and MLPG

Dated: November 16, 1990

APPENDIX

APPENDIX

Excerpts from
ICE MILLER DONADIO & RYAN Brief

CERTIFICATE OF INTEREST

The undersigned counsel of record for Defendants/Appellants, Ted Allan Combs, Individually and as President of Medical Liability Purchasing Group, Inc. of Indiana and Medical Liability Purchasing Group, Inc. of Indiana, furnishes the following list in compliance with Circuit Rule 12(d):

1. The undersigned represents the following parties: (a) Ted Allan Combs; (b) Medical Liability Purchasing Group, Inc. of Indiana.

2. Medical Liability Purchasing Group, Inc. of Indiana has no parent corporation. Further, Medical Liability Purchasing Group, Inc. of Indiana has no stockholders which are publicly held companies owning 10% or more of the stock in Medical Liability Purchasing Group, Inc. of Indiana.

3. The only law firm which has appeared for the Defendants/Appellants or expected to appear for the Defendants/Appellants is Ice Miller Donadio & Ryan of Indianapolis, Indiana.

ICO MILLER DONADIO & RYAN

/s/ James L. Petersen
JAMES L. PETERSEN

Attorney for
Defendants/Appellants Ted Allen
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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal by Defendants/Appellants, Ted Allan Combs, Individually and as President of Medical Liability Purchasing Group, Inc. of Indiana and Medical Liability Purchasing Group, Inc. of Indiana, for review of the final Judgment and Order of the United States District Court for the Southern District of Indiana, New Albany Division, issued June 22, 1989 by District Court Judge S. Hugh Dillin pursuant to 28 U.S.C. § 1291 (1989 Supp.). The Defendants/Appellants filed their Notice of Appeal on July 24, 1989, within the prescribed period of time.

The Defendants/Appellants contend that the District Court lacked subject matter jurisdiction over this action. Nevertheless, the District Court found that it had jurisdiction pursuant to 28 U.S.C. § 1331 (1989 Supp.) and 15 U.S.C. § 3901, *et seq.* (1989 Supp.). Defendants/Appellants jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

The issues presented by Ted Allan Combs and Medical Liability Purchasing Group, Inc. of Indiana for review in this matter are as follows:

1. Whether the District Court had subject matter jurisdiction.

2. Whether the trial court's issuance of a permant injunction based on hearsay evidence was error.

3. Whether the trial court committed error in issuing a permanent injunction where the Plaintiff/Appellee failed to show:

   (a) irreparable harm;

   (b) no adequate remedy at law; and

   (c) the present existence of an actual threat that the action sought to be enjoined will occur.

4. Whether the scope of the permanent injunction is more extensive than is necessary to protect the interests of the Plaintiffs/Appellees.

STATEMENT OF THE CASE

This matter came before the District Court for the Southern District of Indiana on a Complaint by the Department of Insurance of the State of Indiana ("The Department") for preliminary injunctive relief. The Complaint was filed on May 1, 1989, and named Ted Allan Combs, individually and as President of Medical Liability Purchasing Group, Inc. of Indiana, and Medical Liability Purchasing Group, Inc. of Indiana ("MLPG") as Defendants. The Department accused the Defendants/Appellants of violating Indiana and other state laws. The Department claimed that MLPG was doing business in Indiana and other states in violation of cease and desist orders.

The Department asked that the Defendants/Appellants be enjoined from transacting or soliciting all insurance business within the United States; be enjoined from soliciting applications or from collecting or receiving premiums; be enjoined from making payments on any claims; and provide the Department with an accounting of all funds or premiums collected and lists of each and every person solicited for membership in the purchasing group. The Department also asked the Court to order MLPG to provide the name of each and every financial institution in which premiums had been deposited; to produce all documents in their possession or control relating to their "activities"; and enjoin MLPG and Ted Combs from withdrawing or expending any monies collected as a result of their "unauthorized solicitation of insurance business". The Department further asked the court to order all financial institutions having MLPG funds on deposit to freeze their accounts. (Plaintiff's Complaint)

A hearing was held on the request for preliminary injunction on June 5, 1989 and June 6, 1989. At the end

of the hearing, the District Court advanced the hearing on the merits and granted permanent relief. (TR. 170, 186-188) The Order and Judgment, Findings of Fact, and Conclusions of Law were entered on June 22, 1989 and are contained in the Appendix to this brief.

The trial court ordered extensive injunctive relief against Mr. Combs and MLPG. The Court ordered the Defendants/Appellants to cease: the "unauthorized transaction of purchasing group business" in the United States; the solicitation of applications for involvement in the purchasing group; and payment of any claims pursuant to any policy from any account containing money collected from health care providers solicited by MLPG. The Court also ordered the Defendants/Appellants to supply the Department with an accounting of all funds collected by MLPG pursuant to purchasing group's activities; a list of names and addresses of each health care provider solicited for membership in the purchasing group; the name of every financial institution in which MLPG held premiums or commissions received from solicitations for purchasing group membership; and all documents relating to or referring to purchasing group activities. Finally, the Court enjoined Combs and MLPG from withdrawing or expending any funds received from purchasing group activities until further order of the Court. (Order and Judgment of the Trial Court)

STATEMENT OF THE FACTS

MLPG is an Indiana corporation formed pursuant to the Federal Liability Risk Retention Act, 15 U.S.C. § 3901, *et seq.* (1989 Supp.), and Ind. Code Ann. § 27-7-10-1, *et seq.* (West 1989 Supp.). Ted Allan Combs is a licensed insurance agent in the State of Indiana in the areas of property and casualty insurance. (TR. 122)

On July 22, 1988, MLPG incorporated in the State of Indiana as a purchasing group formed pursuant to 15 U.S.C. § 3903 (1989 Supp.). (Plaintiff's Exhibit G)

Purchasing groups are organizations that purchase liability insurance on a group basis. 15 U.S.C. § 3901 (a)(5) (1989 Supp.) MLPG does not sell insurance, but attempts to enroll health care providers as members of its purchasing group for the purpose of obtaining discounted rates for malpractice insurance. 15 U.S.C. § 3903 (a) (1989 Supp.) exempts purchasing groups such as MLPG from restrictive state laws. It provides, in pertinent part:

> (a) Exemptions from state laws, rules, regulations, or orders.
>
> Except as provided in this section, and Section 3905 of this title, a purchasing group is exempt from any state law, rule, regulation or order to the extent that such law, rule, regulation or order would:
>
> (1) prohibit the establishment of a purchasing group; . . . .

15 U.S.C. § 3903(a) (1989 Supp.)

On July 29, 1988, the Department required MLPG to provide the name of a licensed surplus lines agent before it would register MLPG as an Indiana purchasing group. (Plaintiff's Exhibit H) The basis for this rule, as claimed by the Department (TR. 77), is Ind. Code Ann. § 27-7-10-27 (a) (West 1989 Supp.), which provides as follows:

> A purchasing group may not purchase insurance from a risk retention group that is not chartered in a state or from an insurer not admitted in the state in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting under the surplus lines laws and regulations of that state.

Ind. Code Ann. § 27-7-10-27(a) (West 1989 Supp.) This statute requires that the sale of insurance through a licensed agent. The Department has failed to publish any

rules or regulations regarding purchasing groups or surplus lines insurance carriers. (TR. 61)

The Department claims that MLPG failed to provide hte Department with the name of the licensed surplus lines insurance agent MLPG intended to use. (TR. 77) For that reason, Samuel Bolinger, a Deputy Attorney General for the State of Indiana, issued an alleged "cease and desist order" by letter on September 30, 1988 which directed MLPG to cease all purchasing group activities. (Defendant's Exhibit 1) Ind. Code Ann. § 27-7-10-27(a) does not require a purchasing group to use a single agent or name a surplus lines agent before it can do business. This statute simply requirse a purchasing group to use a surplus lines agent if and when a purchase is effected. The "cease and desist order" was issued without compliance with Indiana's Administrative Proceedings Act (Ind. Code Ann. § 4-21.5-3-1 *et seq.* (West 1989 Supp.)).

Although no rules or regulations required MLPG to list the name of a licensed surplus lines agent before it began operation, Ted Combs attempted to comply with the Department's request. Combs took and passed the required tests to become a surplus lines insurance agent. (TR. 93) To qualify as a surplus lines agent, the only remaining requirement was to post a $20,000 bond. (TR. 91)

However, Mr. Combs mistakenly submitted a Twenty Thousand Dollar ($20,000) check instead of the required Twenty Thousand Dollar ($20,000) bond. (TR. 93) The Department rejected the check. (TR. 94) When Mr. Combs realized his error, he tendered a Twenty Thousand Dollar ($20,000) bond as required by the Department. The Department refused to accept it because "pending charges" were filed against him. (TR. 104-106) These "pending charges" are the same ones included in this lawsuit, i.e. that he was doing business a President of MLPG without properly registering MLPG in Indiana. (TR. 112, plaintiff's Exhibit J) Richard

Hamilton, supervisor of surplus lines insurance for the Department, Combs explained that it was departmental policy to refuse license based on mere accusations. (Tr. 106) Mr. Hamilton stated this is an unrecorded, unpublished, internal, department policy. (TR. 107)

When the Department of Insurance makes a determination of status, Indiana's Administrative Proceedings Act requires notice. Ind. Code Ann. 4-21.5-3-5(a) (West 1989 Supp.) Notice must include a description of the order, an explanation of the available procedures and time limits for seeking administrative review, and an explanation of how the applicant can obtain future notice of administrative actions. Ind. Code Ann. § 4-21.5- Bolinger obviously affected the status of MLPG but failed to meet the criteria for such "rulings" as required by Indiana law.

When MLPG and Ted Combs did not provide the name of a licensed surplus lines agent in advance of doing business in Indiana, the Department began sending notices to other states where MLPG was trying to operate. (TR. 18-119; Defendant's Exhibits 2-10) These letters stated that MLPG was not a qualified purchasing group in Indiana and that MLPG would not be allowed to do business in Indiana. (Exhibit Z, letter of February 1, 1989 to Ted Allen Combs; Exhibit W, letter of August 4, 1988 to Medical Liability Purchasing Group).

Based on these letters, some other states issued cease and desist orders. Prior to the hearing at issue here, attorneys for the Department provided form affidavits to the insurance commissioners of various states. (TR 116) Based on the statements of the Indiana Department of Insurance, several insurance departments in other states signed these form affidavits provided by the Department. (Plaintiff's Exhibit R, S, T, U, V, W, X, Y, Z, AA, and BB) The Department then offered these affidavits at the hearing as evidence that MLPG was not allowed to do business in the other states.

The Department introduced a great deal of evidence at the hearing concerning Casualty Assurance Risk Insurance Brokerage Company. (CARIB). CARIB is a surplus lines insurer through which MLPG intended to place insurance for its group members. CARIB is not a party to this action. (TR. 126)

SUMMARY OF AGUMENT

The trial court lacked subject matter jurisdiction over this action. Although the Liability Risk Retention Act (15 U.S.C. § 3901, *et seq.* (1989 Supp.)) removed impermissible state barriers to the formation of liability purchasing groups, this action arose solely under Indiana law. The issues here are whether purchasing groups are required to submit the name of a surplus lines insurance agent under the Indiana Code before they are allowed to do business and whether the so-called "cease and desist" order was valid under Indiana administrative law. These issues only involve state law questions.

The Department failed to allege or show that Combs or MLPG violated any federal laws. As the Department relied on the federal question doctrine for its jurisdictional basis, the trial court should have dismissed this case.

Further, the trial judge erred by relying almost exclusively on hearsay evidence to reach its decision. Other than the alleged violation of the so-called Indiana, "cease and desist order," the Department relied exclusively on affidavits and letters from other states' departments of insurance, which stated that MLPG was not allowed to do business in those states. As these documents were not sponsored by a witness at trial, Defendants/Appellants were denied the right to cross-examine the declarants. The Department made no showing that cease and desist orders after Indiana advised them that it had issued its invalid order.

Plaintiff's case is based on two incorrect propositions. First, Indiana law does not require a purchasing group to provide the name of a surplus lines insurance agent before it will be authorized to do business in Indiana. By creating such arequirement, the Department has violated the Liability Risk Retention Act (15 U.S.C. § 3901, *et seq.* (1989 Supp.), which prohibits states from forming barriers to the formation of purchasing groups. Second, the cease and desist order issued by Deputy Attorney General Samuel Bolinger violated the defendants' constitutional due process rights and the defendants' administrative procedural rights under Indiana law. The order was therefore invalid, a nullity, and of no force or effect. Its violation cannot be a valid basis for this action.

The Department failed to show the requisite elements necessary for permanent injunctive relief. First, the Department failed to show that it would suffer irreparable harm if the permanent injunction was not granted. Further, the department failed to show that it had no other remedy at law. Finally, the department failed to show the present existence of an actual threat of injury. Therefore, the Department failed to meet its requisite burden of proof regarding permanent injunctive relief.

Finally, the relief granted by the trial judge is overbroad, overburdensome, and unnecessary. Although the Department only showed that Combs and MLPG failed to meet an interdepartmental unpublished policy which is unsupported by law, the trial judge effectively denied Combs and MLPG the right to function as a purchasing group. The Department sought a permanent injunction to prevent Combs and MLPG from functioning as a purchasing group. If the court would have issued a permanent injunction against Combs and MLPG which was narowly tailored to protect only the rights involved in this lawsuit, the scope of the Court's order would not be

in question. However, even if one assumes that the Department showed that it was entitled to relief, the Court's Order and Judgment was overbroad. The relief granted denies Combs and MLPG the right to do business anywhere in the United States. It also denies Combs and MLPG the right to pay its salaries or legal fees. The relief grants the Department the right to examine all of MLPG's records concerning purchasing group activity, whether connected to Indiana or not. This type of drastic relief was unsupported by the meager evidence regarding MLPG's alleged application deficiencies offered by the Department.

ARGUMENT

I. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER THIS MATTER.

Section 2 of Plaintiff/Appellee's Complaint cites "15 U.S.C. § 3903 *et seq.*" as its basis for federal subject matter jurisdiction. This subsection is part of the Liability Risk Retention Act, 15 U.S.C. § 3901, *et seq.* (1989 Supp.) and deals specifically with purchasing groups. The Department generally cited 15 U.S.C. § 3901, *et seq.* (1989 Supp.) at the hearing as its jurisdictional basis. (TR. 5) This statute removes state law barriers to the formation of purchasing groups and risk retention groups. Because the Department's claim does not require a construction of the Liability Risk Retention Act or an adjudication of its preemptive effect or constitutionality, the District Court did not have subject-matter jurisdiction over this claim.

The only violations of law alleged by the Department concern Ind. Code Ann. § 27-1-15.5-8(a)(8) (1989 Supp.) and Ind. Code Ann. § 27-1-15.5-8(a)(9) (1989 Supp.). (Plaintiff's Complaint, ¶¶ 25 and 26). The complaint does not allege that Combs and MLPG violated any law of the United States.

The Liability Risk Retention Act prevents the State of Indiana from enacting laws which would make purchasing groups illegal. The Department's requirement that a purchasing group disclose the name of a surplus lines agent before it will be allowed to do business is an example of the type of restricting the Liability Risk Retention Act prohibits. The issues as raised by the Department's Complaint were whether MLPG was a properly licensed purchasing group under Indiana law and whether Mr. Bolinger's so-called cease and desist order was valid under Indiana law. This lawsuit does not directly concern the Liability Risk Retention Act, and did not allege a violation of that act or require an interpretation of that Act. There is no federal question, and thus, no federal subject-matter jurisdiction to satisfy 28 U.S.C. § 1331 (1989 Supp.).

In *Gully v. First National Bank*, 299 U.S. 109, 81 L.Ed. 70, 57 S.Ct. 96 (1936) the United States Supreme Court set the standard to be applied to determine whether federal question jurisdiction exists:

> "[A] right or immunity created by the Constitution or laws of the United States must be an element, and *an essential one*, of plaintiff's cause of action. The right or imunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or another. [Emphasis added]

Id. at 112. (Cites omitted.) Significantly, the *Gully* Court said that the federal controversy must be disclosed on the face of the complaint. *Id.*

The United States Supreme Court recently reaffirmed this standard in *Franchise Tax Board v. Laborers Vacation Trust*, 463, U.S. 1, 77 L.Ed.2d 420, 103 S.Ct. 2841 (1983). Here, the plaintiff cited ERISA (29 U.S.C. § 1001 *et seq.*) as a basis for federal question jurisdiction. The plaintiff's claims concerned a trust set up by

several employers pursuant to ERISA provisions. However, the plaintiff's claim was grounded in California's tax and declaratory judgment statutes. ERISA enabled the employers to set up the trust, but it did not directly affect the plaintiff's claim. The Court stated:

> "[O]riginal federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or other claim is "really" one of federal law.

Id. at 13. The Court held that the federal court did not have jurisdiction in this case because the claim was not created by ERISA and the case did not require the resolution of a substantial question of federal law. *Id.* at 27-28.

The reasoning in *Franchise Tax Board* should be applied here. Although the Liability Risk Retention Act (LRRA) created purchasing groups, it did not create the Department's cause of action. In *Franchise Tax Board*, ERISA enabled the trust to be established but it did not did not create the basis of the plaintiff's claim. Because the Department's action here is based solely on alleged violations of Indiana law, and the LRRA does not directly affect the claim, the Federal District Court lacked subject-matter jurisdiction over this action. Further, the Department's Complaint fails to reveal any federal questions on its face. The trial Court erred when it failed to properly apply *Gully* and his progeny.

EXCERPTS FROM COURT TRANSCRIPT

* * * *

[7] federal question arises. That's not the federal question doctrine.

I have cited a case in our brief in which ERISA was used, was attempted to be used, as a federal question basis simply because one of the defendants was formed under ERISA. The Court summarily dismissed it saying you must have more. You must have some violation of ERISA. You must have some part of ERISA that the Court has to rule upon for subject matter jurisdiction.

They can't. Therefore, the Liability Risk Retention Act is involved in this case only in that the defendants' were formed under this or that that act allowed them to be formed. There must be some federal question that does not exist here.

THE COURT: Well, the act in question, the Liability Risk Retention Act, is, of course, rather sweeping in its scope and tends to inhibit the regulation of certain types of insurance business by the states contrary to previous practice. However, the act, itself, does, in my opinion, put some limitations upon this rather broad statute.

And specifically Section 3103(f) says a purchasing group may not purchase insurance from a risk retention group that is not chartered in a state or from an insurer not admitted in the state in which the purchasing group is located unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such state.

[8] So that is a federal inhibition upon the power of a purchasing group to purchase insurance. This complaint, if I read it accurately, goes to that very issue and alleges that this particular purchasing group is not—well, is inhibited by this federal statute from purchasing insurance from an insurer neither admitted in this state nor is the purchase being effected through or pursuant to the surplus lines laws and regulations.

Since the suit seeks to enforce Title 15, Section 3903(f), I believe that this Court does have jurisdiction. I agree with some of the things counsel for the defendants has said. But he hasn't addressed 3903(f) for obvious reasons, I think. So I think we have jurisdiction.

Now, do you have something further you would like to say preliminarily?

MR. BOLINGER: Yes, Your Honor, we would like next to address the issue of the subpoenas which were served late Friday afternoon by the defendants. We filed a motion to quash. Initially you had issued a protective order on roughly or exactly the same subpoenas a week before this matter. And at that time, on our motion on Friday, we also asked for sanctions.

THE COURT: Well, on Friday, I have here returns on Christine A. Marshall, to subpoena certain employees of the insurance department. Now, they did not obtain service on the plaintiff here, Bettye L. Foy. So there is no need to discuss

* * * *

[182] doubt as to whether ultimately there is any proof that they are valid cease and desist orders.

Clearly they aren't in Indiana, and we don't have enough information to show there are in other states what you have is a validly formed purchasing group that is indeed soliciting and soliciting around the United States. But their activities in that regard have not been shown to be illegal.

The support they received from CARIB is not shown to be illegal. And there is no evidence that any policies have been sold to these doctors or, indeed if there have been any policies sold, that any claims have been denied or that any damage has occurred as a result of that activity. Therefore, under the requirements of federal and/or state law, the elements necessary to issue an injunction, permanent or preliminary, have not been satisfied.

THE COURT: Thank you.

MS. NEISWINGER: We have nothing else.

THE COURT: I meant to ask you when you were on the witness stand, what is your age?

TED ALLAN COMBS: I am 31.

THE COURT: Well, this is certainly the most unusual case that I have had the pleasure of hearing in quite a long while. Here is a young man 31 years of age, high school graduate, apparently intelligent enough to pass the State of Indiana's test to be an insurance agent and surplus lines [183] agent—which might cause the state to review its test; I don't know—but who really doesn't know very much, if anything, about the insurance business, who sits on the stand and under oath blithely admits that this whole company of his, Medical Liability Purchasing Group, Inc., and he, himself, are just a front for this outfit out in Guam.

Now, there has been a lot of conversation, a lot of proof one way and another on these insurance regulations. And although I believe that the defendant, Combs and his company, are in violation of the laws and regulations, there is a lot more to this case than that.

Mr. Combs, you have been sucked into this deal apparently by your uncle. And you have willingly been a front and furnished your address in Jeffersonville and your post office box in Jeffersonville and your rubber stamp to these people. Probably they have told you that the worst that could happen to you would be some state would get serious about enforcing the regulations and prohibit you from selling insurance which you are not really doing anyway.

I want to read to you from the federal statutes having to do with mail fraud, fictitious name or address, and wire fraud. We will start out with mail fraud.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, [184] or to sell, dispose of,

loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use anything represented to be or intimated to be and so on for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing or whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail and so on shall be fined not more than $1,000—which is not $250,000 I might add—or imprisoned not more than five years or both.

Whoever, for the purpose of conducting, promoting, or carrying on any scheme or device mentioned in section 1341 uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address, and so on, shall be fined not more than $1,000—now $250,000—or imprisoned not more than five years or both.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice—that's your phone forwarding service I hope you understand—shall be fined not more than $250,000 or imprisoned not more than five years or [185] both.

Now, this letter which has gone out to thousands of people under the name of your company is replete, that is, full of false and fraudulent representations. I won't even bother to list them. They have been referred to in argument. Just the representation about not being an offshore captive—and actually Medical Liability is the captive of CARIB which is many thousands of miles off the coast of California.

It's underfinanced obviously. It has collected over three million—well, in two years, it's collected five or six

million dollars in premiums. You argue here through your counsel that well, the government hasn't or the State hasn't proved where those premiums came from. But the Court can certainly rely upon circumstantial evidence and its own common sense.

And when the State of Indiana brings in four boxes full of these coupons which have been returned by doctors and other health care people, and the only reason they return them obviously is because they are interested in this insurance written by CARIB, it's a logical and in fact an irresistible conclusion that these premiums collected by CARIB have come from the people solicited by Medical Liability Purchasing Group, Inc. Where else?

So this is just, it's apparent to me, a gigantic fraud in violation of the criminal statutes of the United States of America. And it seems to me that everybody engaged in it is a [186] likely candidate for a United States Penitentiary.

Furthermore, it should be the duty of the Indiana Department of Insurance to call these matters to the attention of the United States Attorney here in Indianapolis.

MS. NEISWINGER: We shall, Your Honor.

THE COURT: And certainly the one in Washington D.C. and Baltimore and as well as Guam, of course. I direct that be done.

I am going to enjoin permanently the defendants in this case from going forward with this fraudulent scheme. I have to consider four things in that regard. Number one, whether the party seeking relief here has an adequate remedy at law and whether there would be irreparable injury unless injunctive relief be granted.

Now, of course, the plaintiff being the State of Indiana in effect is not, itself, going ot suffer pecuniary loss. But it comes before this Court in its position as the parens patriae, I believe the phrase is, the guardian of the best interests of the citizens. And certainly it has no adequate remedy at law. What could it do?

The next thing I have to determine is whether the threatened injury to the plaintiff outweighs the threat-

ened harm to the defendant. Well, that's easily answered. If the defendant and his company are not constrained, the state and its citizens, as well as the citizens of other states, will be threatened with [187] injury and continuing injury. And I can't see any harm to the defendant except he might lose his $433 every two weeks.

I think he would probably be better off in a different occupation anyway because he has been sucked into an occupation that he knows nothing about. And right now, as he sits here, he is a prime candidate to go to the penitentiary.

Of course, if he told the various district attorneys as freely as he has told us here today the exact things that have been going on here, probably he could get consideration. And I would recommend that.

Whether the plaintiff has at least a reasonable likelihood of prevailing, yes, I think so. But, of course, we are not talking about a preliminary injunction anyway. We are talking about the permanent injunction. And the same four principles apply.

And, lastly, whether the granting of an injunction would disserve the public interest. Well, on the contrary, it would certainly serve the public interest. I just regret that CARIB and its officers are not a party to this action because what they will do, unless a diligent follow-up is made, what they will do is simply get another sucker to front for them ad go ahead with this business because they have obviously disregarded these various cease and desist orders.

And I say CARIB because it's already been established by the testimony of Mr. Combs, himself, that neither he nor his front [188] company do anything. CARIB is doing everything. Unfortunately, they are not here in the courtroom.

But it's crooks like this that ought to be put out of business, not only put of business, but they ought to be put in jail. I am taking about CARIB now, Mr. Combs.

But I do call your attention to the fact that Title 18 United States Code, Section 2, the very second section

of the code, reads as follows—I think I will just read it to you. It's the one on aiding and abetting.

Section 2, Principals, (a) Whaever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

So whoever aids in the commission of a crime, whether he dreamed it up or not, is punishable as a principal. That's something that you ought to think about in this matter.

Certainly these people who have been paying in this money should be notified as to what they have gotten themselves into or what they have been induced to get into by these fraudulent letters. And, in short, I think that all of the relief prayed for should be granted and is granted. And you may prepare an entry to that effect and submit it to Mr. Petersen and get it over to me for signature.

But the two defendants are enjoined as of this minute from carrying on this illegal activity.

MS. NEISWINGER: Your Honor, at the present time, the [189] National Association of Insurance Commissioners is meeting in its convention in Cincinnati. We would like to take the list of members and disseminate it to the Commissioners.

THE COURT: You can do anything you want to with it.

MR. BOLINGER: I will take that to the meeting this evening, Your Honor.

THE COURT: All right.

(The Court adjourned at 5:00 p.m.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Thomas A. Richardson 8-29-89
THOMAS A. RICHARDSON Date
Official Court Reporter

4-21.5-3-5 Notice required; certain licensing and other decisions persons who must be notified; contents; effectiveness of order; stays

Sec. 5 (a) Notice shall be given under this section concerning the following:

(1) The grant, renewal, restoration, transfer, or denial of a license not described by section 4 of this chapter.

(2) The approval, renewal, or denial of a loan, grant of property or services, bond, financial guarantee, or tax incentive.

(3) The grant or denial of a license in the nature of a variance or exemption from a law.

(4) The determination of tax due or other liability.

(5) A determination of status.

(6) Any order that does not impose a sanction or terminate a legal right, duty, privilege, immunity, or other legal interest.

(b) When an agency issues an order described in subsection (a), the agency shall give a written notice of the order to the following persons:

(1) Each person to whom the order is specifically directed.

(2) Each person to whom a law requires notice to be given.

(3) Each competitor who has applied to the agency for a mutually exclusive license, if issuance is the subject of the order and the competitor's application has not been denied in an order for which all rights to judicial review have been waived or exhausted.

(4) Each person who has provided the agency with a written request for notification of the order, if the request:

(A) describes the subject of the order with reasonable particularity; and

(B) is delivered to the agency at least seven (7) days before the day that notice is given under this section.

(5) Each person who has a substantial and direct proprietary interest in the subject of the order.

(6) Each person whose absence as a party in the proceeding concerning the order would deny another party complete relief in the proceeding or who claims an interest related to the subject of the order and is so situated that the disposition of the matter in the persons absence, may:

(A) as a practical matter impair or impede the person's ability to protect that interest; or

(B) leave any other person who is a party to a proceeding concerning the order subject to a substantial risk of incurring multiple or otherwise inconsistent obligations by reason of the person's claimed interest.

A person who is entitled to notice under this subsection is not a party to any proceeding resulting from the grant of a petition for review under section 7 of this chapter unless the person is designated as a party in the record of the proceeding.

(c) The notice required by subsection (a) must include the following:

(1) A brief description of the order.

(2) A brief explanation of the available procedures and the time limit for seeking administrative review of the order under section 7 of this chapter.

(3) A brief explanation of how the person may obtain notices of any prehearing conferences, preliminary hearings, hearings, stays, and any orders disposing of the proceedings without intervening in the proceeding, if a petition for review is granted under section 7 of this chapter.

(4) any other information required by law.

(d) An agency issuing an order under this section or conducting an administrative review of the order shall give notice of any:

(1) prehearing conference;

(2) preliminary hearing;

(3) hearing;

(4) stay; or

(5) order disposing of all proceedings;

concerning the order to a person notified under subsection (b) who requests these notices in the manner specified under subsection (c) (3).

(e) If a statute requires an agency to solicit comments from the public in a nonevidentiary public hearing before issuing an order described by subsection (a), the agency shall announce at the opening and the close of the public hearing how a person may receive notice of the order under subsection (b) (4).

(f) If a petition for review and a petition for stay of effectiveness of an order described in subsection (a) has not been filed, the order is effective fifteen (15) days (or any longer period during which a person may, by statute, seek administrative review of the order) after the order is served. If both a petition for review and a petition for stay of effectiveness are filed before the order becomes effective, any part of the order that is within the scope of the petition for stay is stayed for an additional fifteen (15) days. Any part of the order that is

not within the scope of the petition is not stayed. The order takes effect regardless of whether the persons described by subsection (b) (5) or (b) (6) have been served. An agency shall make a good faith effort to identify and notify these persons, and the agency has the burden of persuasion that it has done so. The agency may request that the applicant for the order assist in the identification of these persons. Failure to notify any of these persons is not grounds for invalidating an order, unless an unnotified person is substantially prejudiced by the lack of notice. The burden of persuasion as to substantial prejudice is on the unnotified person.

(g) If a timely and sufficient application has been made for renewal of a license with reference to any activity of a continuing nature and review is granted under section 7 of this chapter, the existing license does not expire until the agency has disposed of a proceeding under this chapter concerning the renewal, unless a statute other than this article provides otherwise. This subsection does not preclude an agency from issuing, under IC 4-21.5-4, an emergency or other temporarry order with respect to the license.

(h) On the motion of any party or other person having a pending petition for intervention in the proceeding, an administrative law judge shall, as soon as practicable, conduct a preliminary hearing to determine whether the order should be stayed. The burden of proof in the preliminary hearing is on the person seeking the stay. The administrative law judge may stay the order in whole or in part. The order concerning the stay may be issued before or after the order described in subsection (a) becomes effective. The resulting order concerning the stay shall be served on the parties, any person who has a pending petition for intervention in the proceeding, and any person who has requested notice under subsection (d). It must include a statement of the facts and law on which is is based.

27-1-15.5-8 Denial, nonrenewal or termination of license; disciplinary sanctions

Sec. 8. (a) The commissioner may suspend, revoke, refuse to continue, renew, or issue any license issued under this chapter, or impose any of the disciplinary sanctions under subsection (e) if, after notice to the licensee and to the insurer represented, and hearing, the commissioner finds as to the licensee any one (1) or more of the following conditions:

(1) Any materially untrue statement in the license application.

(2) Any cause for which issuance of the license could have been refused had it then existed and been known to the commissioner at the time of issuance.

(3) Violation of, or noncompliance with, any insurance laws or violation of any lawful rule, regulation, or order of the commissioner or of a commissioner of another state.

(4) Obtaining or attempting to obtain any such license through misrepresentation or fraud.

(5) Improperly withholding, misappropriating, or converting to his own use any money belonging to policyholders, insurers, beneficiaries, or others received in the course of his insurance business.

(6) Misrepresentation of the terms of any actual or proposed insurance contract.

(7) Conviction of a felony or misdemeanor involving moral turpitude.

(8) The licensee has been found guilty of any unfair trade practice or of fraud.

(9) In the conduct of his affairs under the license, the licensee has used fraudulent, coercive, or dishonest practices, or has shown himself to be incompetent, untrust-

worthy, or financially irresponsible, or not performing in the best interests of the insuring public.

(10) His license has been suspended or revoked in any other state, province, district or territory.

(11) Such licensee has forged another's name to an application for insurance.

(12) Such applicant has been found to have been cheating on an examination for an insurance license.

(13) The applicant or licensee is on the most recent tax warrant list supplied to the commissioner by the department of state revenue.

(b) In the event that the action by the commissioner is to nonrenew or to deny an application for a license, he shall notify the applicant or licensee and advise, in writing, the applicant or licensee of the reasons for the denial or nonrenewal of the applicant's or licensee's license. The applicant or licensee may make written demand upon the commissioner to determine the reasonableness of the commissioner's action. Such hearing shall be held within thirty (30) days from the date of receipt of the written demand of the applicant.

(c) The license of a corporation may be suspended, revoked, or refused if the commissioner finds, after hearing, that an individuals licensee's violation was known or should have been known by one (1) or more of the officers or managers acting on behalf of the corporation and such violation was not reported to the insurance department nor corrective action taken in relation thereto.

(d) In addition to or in lieu of any applicable denial, suspension, or revocation of a license, any person, violating this chapter may, after hearing, be subject to a civil penalty of not less than fifty dollars ($50) nor more than two thousand five hundred dollars ($2,500). Such a penalty may be enforced in the same manner as civil judgments.

(e) The commissioner may impose any of the following sanctions, singly or in combination, when it finds that a licensee is guilty of any offense under subsection (a):

(1) Permanently revoke a licensee's certificate.

(2) Suspend a licensee's certificate.

(3) Censure a licensee.

(4) Issue a letter of reprimand.

(5) Place a licensee on probation status and require the licensee to:

(A) report regularly to the commissioner upon the matters that are the basis of probation;

(B) limit practice to those areas prescribed by the commissioner; or

(C) continue or renew professional education under a licensee approved by the commissioner until a satisfactory degree of skill has been attained in those areas that are the basis of the probation.

The commissioner may withdraw the probation if the commissioner finds that the deficiency that required disciplinary action has been remedied.

(f) The insurance commissioner shall notify the securities commissioner when an administrative action or civil proceeding is filed under this section and when an order is issued under this section denying, suspending, or revoking a license.

27-1-15.5-9 Hearings

Sec. 9. All hearings held pursuant to this chapter shall be governed by IC 4-21.5-3. The commissioner may appoint members of his staff to act as hearing officers for hearings held pursuant to this chapter.

27-7-10-27 Purchasing groups; purchase of insurance from risk retention groups; limitations; notice to members, deductibles; aggregate limits

Sec. 27. (a) A purchasing group may not purchase insurance from a risk retention group that is not chartered in a state or from an insurer nor admitted in the state in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting under the surplus lines laws and regulations of that state.

(b) A purchasing group that obtains liability insurance from an insurer that is not admitted in Indiana or from a risk retention group shall inform each of the members of the group who have a risk resident or located in Indiana that the risk is not protected by an insurance insolvency guaranty fund in Indiana and that the risk retention group or insurer may not be subject to all insurance laws and rules of Indiana.

(c) No purchasing group may purchase insurance providing for a deductible or self-insured retention applicable to the group as a whole. However, coverage may provide for a deductible or self-insured retention applicable to individual members of the purchasing group.

(d) Purchases of insurance by purchasing groups are subject to the same standards regarding aggregate limits that are applicable to all purchases of group insurance.

§ 3903. Purchasing groups

(a) Exemptions from State Laws, rules, regulations, or orders

Except as provided in this section and section 3095 of this title, a purchasing group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would

(1) prohibit the establishment of a purchasing group;

(2) make it unlawful for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its members, advantages, based on their loss and expense experience, not afforded to other persons with respect to rates, policy forms, coverages, or other matters;

(3) prohibit a purchasing group or its members from purchasing insurance on the group basis described in paragraph (2) of this subsection;

(4) prohibit a purchasing group from obtaining insurance on a group basis because the group has not been in existence for a minimum period of time or because any member has not belonged to the group for a minimum period of time;

(5) require that a purchasing group must have a minimum number of members, common ownership or affiliation, or a certain legal form;

(6) require that a certain percentage of a purchasing group must obtain insurance on a group basis;

(7) require that any insurance policy issued to a purchasing group or any members of the group be countersigned by an insurance agent or broker residing in that State; or

(8) otherwise discriminate against a purchasing group or any of its members.

(b) Scope of exemptions

The exemptions specified in subsection (a) of this section apply to

(1) liability insurance, provided to

(A) a purchasing group; or

(B) any person who is a member of a purchasing group, and

(2) the provision of

(A) liability coverage;

(B) insurance related services; or

(C) management services;

to a purchasing group or member of the group.

(c) Licensing of agents or brokers for purchasing groups

A State may require that a person acting, or offering to act, as an agent or broker for a purchasing group obtain a license from that State, except that a State may not impose any qualification or requirement which discriminates against a nonresident agent or broker.

(d) Notice to State insurance commissioners of intent to do business

(1) A purchasing group which intends to do business in any State shall furnish notice of such intention to the insurance commissioner of such State. Such notice

(A) shall identify the State in which such group is domiciled;

(B) shall specify the lines and classifications of liability insurance which the purchasing group intends to purchase;

(C) shall identify the insurance company from which the group intends to purchase insurance and the domicile of such company; and

(D) shall identify the principal place of business of the group.

(2) Such purchasing group shall notify the commissioner of any such State as to any subsequent changes in any of the items provided in such notice.

(e) Designation of agent for service of documents and process

A purchasing group shall register with and designate the State insurance commissioner of each State in which it does business as its agent solely for the purpose of receiving service of legal documents or process, except that such requirement shall not apply in the case of a purchasing group

(1) which

(A) was domiciled before April 1, 1986; and

(B) is domiciled on and after September 25, 1981; in any State of the United States;

(2) which

(A) before September 25, 1981, purchased insurance from an insurance carrier licensed in any State; and

(B) since September 25, 1981, purchases its insurance from an insurance carrier licensed in any State;

(3) which was a purchasing group under the requirements of this chapter before October 27, 1986; and

(4) as long as such group does not purchase insurance that was not authorized for purposes of an exemption under this chapter as in effect before October 27, 1986.

(f) Purchases of insurance through licensed agents or brokers acting pursuant to surplus lines laws.

A purchasing group may not purchase insurance from a risk retention group that is not chartered in a State or from an insurer not admitted in the State in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such State.

(g) State powers to enforce State laws

Nothing in this chapter shall be construed to affect the authority of any state to make use of any of its powers to enforce the laws of such State with respect to which a purchasing group is not exempt under this chapter.

(h) States' authority to sue

Nothing in this chapter shall affect the authority of any state to bring an action in any Federal or State court.

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